IN THE

Supreme Court of the United States

October Term, 1943

No. 463.

LEE ARENAS, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITIONER'S SUPPLEMENTAL BRIEF.

JOHN W. PRESTON,
712 Rowan Building, Los Angeles,
Counsel for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

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I.

The decision of the Circuit Court of Appeals is reported in 137 F. (2d) 199.

II.

The jurisdiction of this Court is invoked under the order of this Court dated December 20, 1943, granting certiorari, under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A., section 347(a)). Presumably, the writ was granted because the decision of the Court below was in conflict with applicable Acts of Congress and with the decisions of this Court and other Circuit Courts of Appeals.

III.

The principal question presented is whether the Secre-

patent to lands in severalty in the Agua Caliente or Palm Springs (California) reservation of the Mission Indians selected by and allotted to petitioner pursuant to the Mission Indian Act (Act of January 12, 1891, ch. 65, 26 Stat. 712) and other applicable Acts of Congress.

IV.

Statement of Facts.

Petitioner is a full blood Mission Indian and is a member of the Palm Springs band of Mission Indians of California. He was born and has at all times since lived upon the Palm Springs Indian Reservation and has at all times kept and maintained his tribal relationship, membership and enrollment in said Palm Springs Band of Mission Indians; and has likewise kept and maintained his home and residence separate and apart from any tribe of Indians on said Reservation, and throughout his whole life has adopted and followed the habits, ways and methods of civilized life [R. 2-4]. Petitioner is able to read and write the English language, possesses a degree of education and intelligence above the average of any race, and since February 8, 1887, has been entitled to all of the rights, privileges and immunities of a citizen of the United States and of the heritage of his Indian ancestry [R. 2-3].

On or about June 7, 1921, the Secretary of the Interior determined that the members of the Palm Springs Band of Mission Indians, including petitioner, were sufficiently advanced in civilization, and had so far adopted the habits and ways of civilized life as to be capable of owning and managing land in severalty [R. 3-4], and pursuant to such determination and to applicable Acts of

Congress the Secretary of the Interior appointed one H. E. Wadsworth as Special Allotting Agent of the United States to make, and cause to be made, allotments of land in severalty in the Palm Springs Indian Reservation to such of the duly and regularly enrolled members of said Band of Mission Indians, including petitioner, as made or might make selection of lands for allotment in severalty and to allot, or cause to be allotted, to them the lands selected by them, respectively, in severalty [R. 3-4]. Pursuant to such appointment, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, made surveys of the lands of the various tribes or bands of the Mission Indians of California, including the Palm Springs Band. in order to make allotments in severalty to the members of the several tribes or bands of Mission Indians, including said Palm Springs Band.

On or about the ..... day of June, 1923, petitioner made his selection of lands for allotment in severalty to him as follows: Lot No. 46, Section 14; Tract No. 39, Section 26, and E½ SW¼ NW¼ and SE¼ NW¼ NW¼ and SW¼ NE¼ NW¼ of Section 26, all in Township 4 South, Range No. 4 East of the San Ber. M., containing 47 acres more or less according to Government Survey. Said selection included the homesite which petitioner then and for a long time prior thereto had occupied and partially improved as his homesite [R. 4-5].

On or about June 21, 1923, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, issued to petitioner a certificate of selection for allotment of said lands [R. 4-9] and in evidence thereof inscribed said selection for allotment on the Official Special Allotment Schedules, and thereafter certified said selection

for allotment, and other such selections, and said Schedules to the Secretary of the Interior [R. 4-5].

The Certificate so issued to the petitioner is in the words and figures following:

"5-201

"SELECTION FOR ALLOTMENT

"On Agua Caliente Indian Reservation, 1923.

"This is to Certify That Lee Arenas has selected the Lot No. 46, Sec. 14, Tract No. 39, Sec. 26, and E½ SW¼ NW¼ & SE¼ NW¼ NW¼ & SW¼ NE¼ NW¼ of Sec. 26, all in Township 4 South, Range No. 4 East of the San Ber. M., containing 47 acres, more or less, according to Government Survey. Stake No. .....

"Not valid unless approved by the Secretary of the Interior.

(signed) H. E. WADSWORTH
U. S. Special Alloting Agent."

"6-1060." [R. 5-7.]

On or about October 26, 1923, the said H. E. Wadsworth, as such Special Allotting Agent of the United States, was notified by the Bureau of Indian Affairs of the Department of the Interior that the members of the Palm Springs Band of Mission Indians, including petitioner, might enter upon and take physical possession of the lands selected by them, respectively, for the planting and cultivation of crops [R. 10]. And thereafter the said Special Allotting Agent of the United States, in ac-

cordance with the custom of the Bureau of Indian Affairs, encouraged and permitted petitioner to make, and petitioner did make, permanent improvements upon the lands so selected by and allotted to him of the cash value of $15,000 [R. 12-15].

The Secretary of the Interior has failed to issue to and withholds from petitioner a trust patent in severalty to the lands selected by petitioner, and this suit is brought to secure a judicial determination of petitioner's right to such patent.

The District Court held that the issues raised by the complaint had been decided adversely in *St. Marie v. United States,* 108 F. (2d) 876 [R. 59-60], and the Circuit Court of Appeals affirmed the decision of the District Court (137 F. (2d) 199). This Court has granted certiorari.

V.

Assignments of Error.

The Court below (the Circuit Court of Appeals for the Ninth Circuit), erred in affirming the judgment of the District Court for the following reasons:

1. The decision of the Circuit Court of Appeals is contrary to the applicable Acts of Congress and to the decisions of this Court and other Circuit Courts of Appeals.

2. Under the facts pleaded in the complaint the United States of America is estopped to deny the power and the

duty of the Secretary of the Interior to issue a trust patent to petitioner to the lands selected for allotment by him.

3. The United States of America is estopped by reason of the laches of the Secretary of the Interior, in withholding formal approval of petitioner's selection for allotment, to deny petitioner's equitable right and title to the lands selected by him.

4. The law does not authorize the Secretary of the Interior to withhold a trust patent from a qualified allottee who has established an equitable right thereto.

5. The petitioner has done everything which the Acts of Congress and law require him to do to attain his right to a trust patent to the lands selected by him for allotment, and the neglect or failure of the Secretary of the Interior to issue such patent does not defeat petitioner's right thereto.

VI.

Summary of Argument.

Under the facts shown by the Complaint, petitioner has a vested right to a trust patent to the lands selected by and allotted to him, and the Secretary of the Interior is without authority to withhold such patent and is estopped to deny petitioner's equitable right and title in said lands.

VII.

ARGUMENT.

A. Petitioner Is Vested With an Equitable Right to a Trust Patent for Lands Selected by and Allotted to Him.

The decisions of the District Court and of the Circuit Court of Appeals in this case rest entirely upon the authority of *St. Marie v. United States*, 108 F. (2d) 876. It is, therefore, necessary to state briefly the substance of the decision in that case. It was there held that

> "before there could be a valid allotment the Secretary must: (1) determine that the Indians have reached a degree of civilization required by the (Mission Indian) Act; (2) make an order 'setting up the mechanics for selection'; and (3) make and approve actual allotments; that no allotment was made; and that if the certificates of selections could be considered as . . . certificates of allotment the same were not effective because there had been no determination that the Indians in question were sufficiently advanced so as to comply with the Act, and the approval of the Secretary was lacking. 24 F. Supp. 237-240." (*St. Marie v. United States*, 108 F. (2d) 876, at p. 879.)

This holding was given full application to the case at bar.

The answer to the foregoing statements and holdings in the *St. Marie* case may be summarized as follows: (1) The Congress, by the Act of March 2, 1917, determined that the Mission Indians of California were so advanced in civilization as to be capable of owning and managing

lands in severalty, and accordingly directed the Secretary of the Interior

> "to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California,"

which determination and direction were recognized and followed by the Secretary of the Interior, who appointed a Special Allotting Agent for the Mission Indians of California and thereafter caused selections for allotments of lands in severalty to be made and certified for them. (2) "The mechanics for selection" had already been created by the General Allotment Act (Act of February 8, 1887, Ch. 119, *24 Stat. 388*) and were, therefore, by operation of law as well as in fact, embraced in the appointment and authorization of the Special Allotting Agent to cause selections for allotments to be made in conformity with the provisions of both the Mission Indian Act, as amended, and the General Allotment Act (Sections 2 and 3) as amended. (3) The approval of the selections for allotments which were later made is implicit in the acts and conduct of the Secretary of the Interior in (a) putting the allottees, including petitioner, in possession of the lands selected by and certified to them; (b) in the authorization by the Secretary to occupy, use and improve the same, and (c) in the failure of the Secretary for many years thereafter to question the equitable right and title of the allottees therein. And (4) the Secretary issued trust patents, under the same procedure, to approximately one thousand Mission In-

dians on other Mission Indian Reservations in California (*St. Marie v. United States,* 108 F. (2d) 876, p. 887), thereby conclusively showing that he was following the determination of civilization, made by Congress by the Act of March 2, 1917, and that he had set up and followed the mechanics for selection created by the General Allotment Act, and had made the allotments and issued the trust patents in conformity with these and other Acts of Congress. An examination of the several applicable Acts of Congress becomes advisable.

B. Petitioner's Vested Right to a Trust Patent Accrued Under the General Allotment Act. as Amended, and Other Applicable Acts of Congress.

(Pertinent Acts. or portions of Acts, of Congress appear in the Appendix to the Petition and supporting Brief.)

GENERAL ALLOTMENT ACT.

The General Allotment Act (Act of February 8, 1887. Ch. 119, *24 Stat. 388*)

> "was intended to be and was a general act relating to all Indian reservations, except those mentioned in section 8, 24 U. S. C. A., section 388." (*St. Marie v. United States,* 108 F. (2d) 876, 878.)

The reservations excepted in Section 8 of the Act do not include the Mission Indian reservations.

Section 1 of the General Allotment Act provides:

> "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon

any reservation created for their use * * * the President of the United States be, and he hereby is, authorized * * * to cause said reservation or any part thereof, to be surveyed, or resurveyed, if necessary, and to allot lands in said reservation in severalty to any Indian located thereon * * *."

Section 2 of the Act provides:

"That all allotments set apart under the provisions of this Act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection."

Section 3 of the Act provides:

"That the allotment provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe * * *."

Section 5 of the Act provides:

"That upon approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the land thus allotted, for a period of twenty-five years, in trust * * *."

These provisions of the General Allotment Act became engrafted upon and a part of the Mission Indian Act upon its enactment in 1891 and therefore supplied "the me-

chanics for selection" of allotments under the latter Act. Furthermore, the Special Allotting Agent's certification of these allotments to the Secretary of the Interior shows

> "that the allotments shown hereon were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910 (36 Stat. L. 855), and supplemented by the Act of March 2, 1917 (39 Stat. L. 969-976)." (*St. Marie v. United States*, 108 F. (2d) 876, at page 879.)

One of these provisions, which thus became engrafted upon the Mission Indian Act, was

> "that all allotments * * * shall be selected by the Indians, heads of families selecting for their minor children * * *." (Sec. 2, Gen. Allot. Act.)

This right of selection by the Indians therefore existed at the time of the passage of the Mission Indian Act (Secs. 1 and 2) and became, and is, a part thereof.

MISSION INDIAN ACT.

The Mission Indian Act (Act of January 12, 1891, Ch. 65, *26 Stat. 712*) was passed by Congress "for the relief of the Mission Indians in the State of California" and "to arrange a just and satisfactory settlement of the Mission Indians * * * upon reservations which shall be secured to them" as provided therein. To accomplish these objects and purposes, the Act provided for the appointment of a Commission "to select a reservation for each band or village of the Mission Indians residing within said State * * * sufficient in extent to meet their just requirements * * *." (Secs. 1 and 2.) The Act further provided (Sec. 3) that, upon completion of

their work, the Commission "shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commission and approved by him in favor of each band or village" in trust for 25 years "and that at the expiration of said period the United States will convey the same or remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust * * *." It is apparent that Sections 1, 2 and 3 of the Act are mandatory, and leave little, if anything, to the discretion of the Secretary of the Interior.

Section 4 of the Act provides

> "that whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary * * * may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows * * *."

Section 5 of the Act provides

> "that upon approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents (in trust) to issue therefor in the name of the allottees"

for twenty-five years.

It thus appears that the Mission Indian Act made no express provision for the selection of land in severalty by the Mission Indians, nor did it provide any mechanics

for such selection and allotment. The Mission Indian Act was silent in these respects, because the right of selection, and the mechanics necessary to make selections and allotments in severalty, already existed under the General Allotment Act. It was wholly unnecessary for the Congress to incorporate the provisions of existing general law into the Mission Indian Act. This is true: first, because the General Allotment Act *in terms* was made applicable to "*any* tribe or band of Indians (that) has been, *or shall hereafter be*, located upon any reservation created for their use"; and, second, because the General Allotment Act and the Mission Indian Act are statutes *in pari materia* and should be construed together in order to determine and make effective the legislative intent with respect to the Mission Indians.

In this connection, it is said in 25 R. C. L. 1060, Section 285, that:

> "It is a fundamental rule of statutory construction that not only should the intention of the lawmaker be deduced from a view of the whole statute and of its every material part, but statutes in *pari materia* should be construed together."

See, also:

Richardson v. Harmon, 222 U. S. 96, 56 L. Ed. 110;

United States v. Ewing, 237 U. S. 197, 59 L. Ed. 913;

Bankers' Trust Co. v. Bowers, 295 Fed. 89;

Heiden v. Cremin, 66 F. (2d) 943, 91 A. L. R. 247 (Cert. den. 290 U. S. 687, 78 L. Ed. 592).

This rule applies not only to contemporaneous statutes, but also to earlier statutes in *pari materia*. See 25 R. C. L., p. 1063, Section 287, where it is said that

> "Statutes *in pari materia* to which reference may be made in aid of construction are not only contemporaneous statutes, but also earlier statutes *in pari materia*. The legislature is presumed to have been acquainted with their judicial construction, and to have passed new statutes on the same subject with reference thereto."

The rule finds ample support in *Panama R. Co. v. Johnson*, 264 U. S. 375, 68 L. Ed. 748; *United States v. Jefferson Elec. Co.*, 291 U. S. 386, 78 L. Ed. 859, and *United States v. Arizona*, 295 U. S. 174, 79 L. Ed. 1371.

The Mission Indian Act discloses the legislative intent to be, that reservations be created for the Mission Indians and that, as soon as any of these Indians should be capable of owning and managing lands in severalty, patents in trust be issued to them. This legislative intent can be made completely effective by applying the provisions of the General Allotment Act, and this should be done because

> "it is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview and scope coming into existence subsequent to their passage." (25 R. C. L. 778, sec. 24.)

Schus v. Powers-Simpson Co., 85 Minn. 447, 89 N. W. 68;

Palmer v. State, 197 Ind. 625, 150 N. E. 917;

Commonwealth v. Maxwell, 271 Pa. St. 378, 114 Atl. 825, 16 A. L. R. 1134;

State ex rel Anderson v. Fousek, 91 Mont. 448, 8 P. (2d) 791, 84 A. L. R. 303;

Haselton v. Interstate Stage Lines, 82 N. H. 327, 133 Atl. 451, 47 A. L. R. 218;

Re Fox Film Corporation, 295 Pa. 461, 145 Atl. 514, 64 A. L. R. 499.

THE ACT OF JUNE 25, 1910.

Section 17 of the Act of June 25, 1910, amended the Act of February 28, 1891, which latter Act amended the General Allotment Act. Said Section 17 provided:

"That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservations created for their use by treaty, stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located therein to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservations subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice

the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land. * * *."

The similarity between the language of section 17 of the Act of June 25, 1910, and section 1 of the General Allotment Act. is apparent, and conforms to the general pattern of Congressional legislation for Indians.

The Act of June 25, 1910, has an important bearing on the rights of the Mission Indians of California, in that it provides for and regulates allotments of irrigable lands, for which no provision was made in any of the Mission Indian Acts. It is also important because it is an amendment to the General Allotment Act which by the Act of March 2, 1917 (39 Stat. 969-976), by name and designation, is made applicable to the Mission Indian reservations in California.

THE ACT OF MARCH 2, 1917.

It is provided in the Act of March 2, 1917, which is amendatory of the Mission Indian Act:

"That section three of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and twelve) entitled 'An Act for the relief of Mission Indians in California,' be, and the same is hereby amended so as to authorize the President, in his discretion and whenever he shall deem it for the best interests of the Indians affected thereby, to extend the trust period for such time as may be advisable on the lands held in trust for the use and benefit of the Mission Bands or villages of Indians in California: Provided, that *the Secretary of the Interior be and he is here-*

by, authorized and directed to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservations in the State of California, in areas as provided in section seventeen of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and fifty-nine), instead of as provided in section four of the Act of January twelfth, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, page seven hundred and thirteen): Provided, that this act shall not affect any allotments heretofore patented to these Indians." (Italics ours.)

It is significant that when the Act of March 2, 1917 was enacted more than twenty-five years had elapsed since the enactment of the Mission Indian Act. Thus the Congressional intent was to be effectuated.

It is obvious that the Act of March 2, 1917, was designed not only to provide for the allotment of irrigable lands for which no provision had previously been made, but to make mandatory, instead of discretionary, the allotment of these and other lands in severalty to the Mission Indians in California. It is also obvious that the Secretary of the Interior so construed this Act, for soon thereafter he appointed a Special Allotting Agent, and other proceedings were had to carry out the legislative mandate expressed in the Act. Moreover, the same construction of the Act appears in a communication from the Attorney General of the United States, signed by the Assistant Attorney General to the Secretary of the Interior, wherein it was said:

"As to the allotment feature of the situation, we are confronted with the provision in the Act of March 2, 1917 (39 Stat. 976), amending section 3

> of the Act of January 12, 1891 (26 Stat. 712), *so as to direct* the Secretary of the Interior to make allotments to the Indians of the Mission Reservations in California in areas as provided in section 17 of the Act of June 25, 1910 (36 Stat. 859), rather than as provided in section 4 of the Act of January 12, 1891, *supra;* in other words, *usually regarded as mandatory rather than discretionary legislation.*" (*St. Marie v. United States,* 108 F. (2d) 890.) (Italics ours.)

It is apparent that the Act of March 2, 1917, not only amended but superseded sections 3 and 4 of the Mission Indian Act in the respects mentioned. Moreover, the Act of March 2, 1917, being mandatory, constituted a determination by the Congress that the Mission Indians in California had so advanced in civilization as to be capable of owning and managing lands in severalty.

THE ACT OF FEBRUARY 14, 1923.

It was provided in the Act of February 14, 1923 (Ch. 76, 42 Stat. 1246),

> "That unless otherwise specifically provided, the provisions of the Act of February 8, 1887 (Twenty-fourth Statutes at large, page 388), as amended, be, and they are hereby, extended to all lands heretofore purchased or which may hereafter be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians."

This Act made lands purchased for the Indians on all reservations subject to the General Allotment Act, and a plain implication arises that public lands of the United

States, withdrawn and set apart for the use of these Indians, are by existing statutes made subject to the provisions of that Act.

With the passage of the Act of February 14, 1923, a comprehensive legislative scheme for making allotments in severalty to all Indians, including the Mission Indians in California, was completed by the Congress, covering all classes of land set apart for the use of any tribe or band of Indians.

The five Acts of Congress hereinbefore mentioned and discussed constitute a complete and fully integrated legislative plan for the allotment of lands in severalty to the Mission Indians in California. Each of these five Acts is entirely consistent with the others. There is no repugnancy between them. These statutes are *in pari materia* and must be construed as one system and must be governed by one spirit and policy in order to carry out the legislative intent. (See *Moore v. C. & O. Ry. Co.*, 291 U. S. 205, 214, 78 L. Ed. 755; *Kernin v. City of Coquille*, 143 Or. 127, 21 P. (2d) 1078, 1080; *Tragessor v. Cooper*, 313 Pa. 10, 169 Atl. 376, 377; and other cases, *supra.*) Thus considered and given effect, the intent and plan of the Congress will not be thwarted.

These statements and conclusions are in harmony with well recognized rules of statutory construction. One of these is that in the "construction of statutes we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute."

(25 R. C. L. 1052, sec. 277.) Moreover, "no single statute should be interpreted solely by its own words" for "upon enactment it becomes a part of, and is to be read in connection with, the whole body of the law. Its interpretation is to be in the light of the general policy of *previous* legislation" * * * and "should receive such construction as will not conflict with general principles and will make it harmonize with the pre-existing body of law." (*Idem.*)

See, also:

Farrington v. Commissioner of Internal Revenue, 30 F .(2d) 915, 67 A. L. R. 535 (Cert. den. 279 U. S. 873, 73 L. Ed. 1008);

General Motors Acceptance Corp. v. Crumpton, 220 Ala. 297, 124 So. 870, 65 A. L. R. 1313;

Bookhart v. Greenlease-Lied Motor Co., 215 Iowa 8, 244 N. W. 721;

Kneeland v. Emerton, 280 Mass. 371, 183 N. E. 155, 87 A. L. R. 1;

Com. v. Flynn, 285 Mass. 136, 188 N. E. 627, 92 A. L. R. 206.

C. Petitioner Is Entitled to a Trust Patent to the Lands Selected by and Certified for Allotment to Him.

It is clear that, in such circumstances as appear in the record of this case, the selection of an allotment is the inception of an equitable title, and the right thereto may not be defeated by the arbitrary action of the Secretary of the Interior in withholding a trust patent to the lands selected,

See:

Ladiga v. Roland, et al., 2 How. 581, 43 U. S. 581, 11 L. Ed. 387;

Hy-Yu-Tse-Mil-Kin v. Smith, 194 U. S. 401, 414, 48 L. Ed. 1039; *Ballinger v. United States ex rel Frost*, 216 U. S. 240, 249, 54 L. Ed. 464;

Fairbanks v. United States, 223 U. S. 215, 56 L. Ed. 409;

Henry Gas Co. v. United States, 191 Fed. 136;

Thomason v. Wellman & Rhoades, 206 Fed. 895, 897;

United States v. Dowden, 220 Fed. 277;

United States v. Whitmire, 236 Fed. 474.

The fact that no patent is issued is immaterial.

"When the right to a patent has once become vested under the law, it is equivalent, so far as the government is concerned, to a patent actually issued. *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Deffeback v. Hawke*, 115 U. S. 392, 6 Sup. St. 95, 29 L. Ed. 423; *Hedrick v. Railroad Co.*, 167 U. S. 673, 17 Sup. Ct. 922, 42 L. Ed. 320; *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540, affirmed *id.*, 204 U. S. 415, 27 Sup. Ct. 363, 51 L. Ed. 547. *An allotment certificate has the same effect as the action of the Land Department in the disposition of the public lands within its control. Wallace v. Adams, supra; United States v. Dowden, supra.*" (*United States v. Whitmire*, 236 Fed. 474, 480.) (Italics ours.)

When a selection for allotment has been made and the right of allotment has attached, delay in issuing, or failure to issue the patent does not postpone or defeat the

vesting of the equitable interest in the allottee. The right, in that case, depends upon what ought to have been done. A selection made at a time when the right exists to do so creates an interest or right so vested that it descends to the heirs and fixes the right of property.

See:

Smith v. Boniface, 132 Fed. 889, 891;

St. Marie v. United States, 876, 895 (dissenting op.);

Lytle, et al. v. Arkansas, 9 Howard 314, 13 L. Ed. 153;

Barney v. Dolph, 97 U. S. 652, 24 L. Ed. 1063;

Cornelius v. Kessel, 128 U. S. 469, 32 L. Ed. 482;

Ballinger v. United States ex rel Frost, 216 U. S. 240, 54 L. Ed. 464;

United States v. Payne, 284 Fed. 827;

Payne v. Mexico, 255 U. S. 367, 65 L .Ed. 680.

The Department of the Interior, as late as July 31, 1929, some years after petitioner's right to a patent had accrued, held in *Raymond Bear Hill*, 52 L. D. 68, that the right of a qualified Indian to an allotment is analogous to that of an entryman to public lands, saying:

> "* * * it may be said generally that it is well settled that a claimant to public land who has done all that is required under the law to perfect his claim, acquires a right against the Government and that his right to a legal title is to be determined as of that time. This rule is based on the theory that by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his and the Government holds it in trust for him,

although no legal title passes until patent issues. *Wyoming v. United States* (255 U. S. 489 (41 S. Ct. 393, 65 L. Ed. 742)); *Payne v. New Mexico* (255 U. S. 367 (41 S. Ct. 333, 65 L. Ed. 680)); *Payne v. Central Pacific Railway Company* (255 U. S. 228 (41 S. Ct. 314, 65 L. Ed. 598)). It would seem to follow that what is true concerning the equitable rights of an entryman to public land is also true as to the equitable rights of a qualified Indian to an allotment of tribal or reservation land. In fact, the position of a qualified Indian is stronger than that of an entryman of public land, for the reason that he has an inherent interest in the common property of his tribe."

* * * * * * * *

"The rule applicable in this matter is the same as that applying to any qualified person who performs all conditions prescribed by law to secure entry of lands open thereto—the law considers that as done and virtually views the entry made. *Hy-Tu-Tse-Mil-Kin v. Smith* (194 U. S. 401 (24 S. Ct. 676, 48 L. Ed. 1039))."

Even if the Act of March 2, 1917, had not deprived the Secretary of the Interior of the discretion granted to him by section 4 of the Mission Indian Act, petitioner's right to a patent under the facts disclosed here would exist. See, *Supervisors of Rock Island County v. United States ex rel. State Bank*, 4 Wall. 435, 71 U. S. 435, 18 L. Ed. 419 where the question was, whether the Supervisors were compelled to levy and collect, by taxation, an amount specified by the Court below. The act involved provided that where "current revenue * * * is not sufficient to pay (the Supervisors) *may*, if deemed advisable, levy a special tax * * *." (Italics ours.) As

to the construction to be placed upon this language the Court said, page 446, 18 L. Ed. 419:

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his."

Moreover ,as shown in the Petition and supporting brief, pages 11-14, the United States is estopped to question petitioner's equitable right and title to the lands selected for allotment by him.

Under the authorities cited herein and in the Petition and supporting brief, petitioner is entitled to a trust patent to the lands selected by and alloted to him. If the Secretary of the Interior can, upon his own capricious judgment, decide that lands authorized to be allotted by Congress ought not to be allotted, or if he can refuse without lawful cause to approve allotments made in conformity with law when submitted for action, then he can, in effect, nullify the law by withholding lands from allotment which the Congress has authorized and directed to be apportioned among the Indians entitled thereto. That he cannot lawfully withhold a trust patent from any Indian entitled thereto is clearly shown by the Act of February 6, 1901, Ch. 217, 31 Stat. 760, 25 U. S. C. A., section 345, which was enacted to correct such an abuse of power.

Conclusion.

The decision below is erroneous. It is therefore respectfully submitted that the judgment of the Court below should be reversed and this cause be remanded for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

JOHN W. PRESTON,
Counsel for Petitioner.

March ....., 1944.